Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-455

ALFRED RUSSOM, et al.,
Petitioners,

vs.

SEARS, ROEBUCK AND CO., a Corporation, and LOCAL 610, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOCAL 688, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

DANIEL P. REARDON, JR.
411 North Seventh—Suite 1401
St. Louis, Missouri 63101
Attorney for Petitioners

Of Counsel
KENNETH V. BYRNE
411 North Seventh Street
St. Louis, Missouri 63101

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners, Alfred Russom, et al., pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 29, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported as of this date and is reprinted in the Appendix D.

The Eighth Circuit's Order of July 20, 1977 denying the Petition for Rehearing is reprinted as Appendix A. The other opinions below are also reprinted in the Appendix and in addition, petitioners have also set out in the Appendix a copy of their Petition for a Rehearing and a Statement of Errors in the opinions below.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 29, 1977. Petition for rehearing was denied by order of the Eighth Circuit on July 20, 1977. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

CAN EMPLOYEES BE FOREVER DEPRIVED OF NEGOTIATED PENSION BENEFITS AND FOREVER DEPRIVED OF OVER ONE MILLION DOLLARS ($1,000,000.00) CONTRIBUTED BY SAID EMPLOYEES THROUGH THE DEVICE OF CHANGE OF CORPORATE FORM?

CAN A UNION SIT IDLY, NOT ONLY FAILING TO ENFORCE THE COLLECTIVE BARGAINING AGREEMENT AND FAILING TO ADVISE ITS MEMBERS, BUT ALSO ABANDONING ITS MEMBERS AND NOT BREACH ITS DUTY OF FAIR REPRESENTATION BY ITS CONDUCT?

CAN EMPLOYEES BE DENIED AND DEPRIVED OF THE REMEDY GIVEN THEM BY THE SUPREME COURT IN "*John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) and subsequent cases," BY THE REFUSAL OF THEIR UNION TO ACT?

STATEMENT OF THE CASE

This case was brought by certain named plaintiffs as a class action against their employer, Sears, Roebuck and Co., a corporation, and against their unions, Locals 610 and 688, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; the suit was basically a "301" suit against the employer for breach of contract and the unions for breach of the duty of fair representation, the remedy granted to employees by this Court in *Vaca v. Sipes*, 386 U.S. 171, 77 S. Ct. 903, 17 L.Ed. 2d 842 (1967). Jurisdiction of the court was invoked under Title 29 U.S.C. 185, et seq.; this particular case was probably a case of first impression because it also involved this Court's decisions concerning co-employer or successor employer, as well as questions concerning interference with contract and piercing the corporate veil. The trial court denied the class action status and the case proceeded to trial with approximately forty-five (45) named plaintiffs.

The basic facts in this case are not seriously disputed and petitioners will set forth a concise statement of the facts material to the questions presented for review by this Court. In 1956, Sears was having a labor problem with Local 1, International Brotherhood of Electrical Workers over the contract which covered employees of Sears performing service work on appliances. In April, 1956, John Baumler (who had previously been employed by Sears for approximately 16 years and who had previously set up a company called "B Right" in 1952 which company did 100% of its business with Sears, "B Right" having been set up due to a strike situation in St. Louis) set up a company called "Dependable Appliance Service". Mr. Baumler obtained space in a building, put an ad in the newspaper, interviewing applicants who answered the ad and so on; about this same time, a labor contract was secured with Local 610 of the Teamsters although "Dependable" had no business and no em-

ployees. (Although not directly an issue in this case, it should be noted upon charges being filed with the NLRB in 1956, the NLRB held that the "contract with Local 610" was void because "Dependable had no employees when it entered into such contract" and ordered an election.) During the period from 1956 through October 1, 1974, Sears, through the "Dependable operation" performed its "service work on appliances" in the St. Louis area, "Dependable" having little or no other business. The "Dependable" operation began in a building in the 1900 block of Locust (Sears parts department occupying part of the same building); in about 1966, it was moved to the Sears warehouse operation building at 1024 South Vandeventer in St. Louis.

Alfred Russom and the other forty-four (44) or so petitioners were employed by the Dependable operation as appliance servicemen and their employment was covered by a collective bargaining agreement entered into between the Dependable operation and Local 610 of the Teamsters; there had been numerous contracts between 1956 and October, 1974, with the contract in effect during that period having effective dates of approximately May 8, 1972 to May 3, 1975. Although Sears did not have its name on these labor contracts, did not sign the contracts and did not have its own labor people present at the bargaining table, the petitioners have contended throughout and have produced substantial evidence that Sears was Dependable, Dependable merely being a "name or shell" set up to get Sears out of its labor problem with Local 1 of IBEW back in 1956. The evidence produced showed that Sears trained the employees without any cost; Sears sent the people for training at its Sears Niles Training Center; Sears gave the people training courses which were only available to employees of Sears; Sears accompanied the people on service calls; Sears provided all parts without charge; Sears directed that trucks be taken home by the people; Sears increased and decreased the work force; Sears owned the equipment and tools used by the people; some of the

people worked in the Sears stores under direct supervision of Sears employees; the people sold Sears' maintenance agreements on a commission basis; the people participated in Sears' contests; records of the production of these people were kept by Sears on computer readouts; Sears supervisors gave out work orders to the people on a regular basis and even put notes on his work orders to contact a Sears employee and other abundant evidence.

Concerning the "labor function", there was substantial evidence that Local 610 both knew and considered Sears to be the real person behind the Local 610-Dependable contracts; this evidence was from the testimony of business agents of Local 610 and a specific example was a "dispute over the jurisdiction of service work" in 1970. When this dispute arose, Local 610 went to Sears' labor people and had the jurisdictional problem straightened out with the work being awarded to Local 610.

Having provided some of the necessary background, petitioners will now detail the occurrences which gave rise to the litigation. In August, 1974, the people employed in the Dependable operation were notified that this operation was going to be closed down as of September 30, 1974; on receiving this notice, the people, including petitioners, immediately contacted their union, Local 610 of the Teamsters to see what their rights were under the collective bargaining agreement which was in effect and had over a year left prior to its expiration date and which contract had a successor clause. There can be no dispute that Local 610 was the duly elected bargaining agent for these people at least up to and including September 30, 1974 which is the date on which Dependable said that it was ceasing operations.

A meeting of members of Local 610 was held on September 9, 1974, to "discuss" the problems due to the announcement made by the Dependable operation. Mr. Horn, the secretary-treasurer and chief officer of this union, testified at the trial that

he did not recall this meeting. Other evidence at trial proved that at that meeting on September 9, 1974, Mr. Horn told the people that the Dependable-Local 610 contract was non-existent on that date, September 9, 1974; Mr. Horn refused to take a grievance; Mr. Horn would not discuss the successor clause and Mr. Horn said there was nothing he was going to do for the people, closed his briefcase and left.

Another meeting was held on September 23, 1974. Mr. Horn remembered this meeting and testified that he did not discuss the "successor clause" with the people. He further testified that he told the people that Local 688 of the Teamsters had jurisdiction over them and advised the people to sign authorization cards for Local 688. Petitioners testified that they were told that "they had to sign authorization cards for Local 688 that evening" if they desired to work for Sears any longer.

As the result of this, the people were transferred to Local 688 of the Teamsters and lost their seniority, lost their pension contributions, lost their pension rights, lost their cost of living clause, lost vacation benefits, lost numerous other benefits and basically lost their livelihoods.

Petitioners specifically call the attention of this Court to the Statement of Errors in Opinions Below on page A-11 because petitioners believe that the lower courts have not understood the case, but have rendered decisions while "looking the other way" at both the evidence and the law governing this case. Petitioners state that "their case" has not received fair consideration which was apparent from the first day of trial when the trial court stated that it had never seen a case like it.

REASONS FOR GRANTING THE WRIT

This case, being a case of first impression, and more particularly the questions presented involve a very important and basic concept of the relation between employees, their unions and their employers. Naturally, the petitioners, employees in this case are extremely concerned about the loss out of their pockets of over one million dollars ($1,000,000.00) which they personally had paid in contributions to their pension; however, it is imperative for this Court to grant the Writ for the further and broader reason that if this judgment is allowed to stand, the two very important remedies of employees, first, breach of the duty of fair representation and second, responsibility of successor employers, will be virtually eliminated which in effect means that denial of a Writ in this case will effectively overrule conflicting decisions of this Court.. Petitioners state that allowing this lower court decision to stand will be a signal to employers and unions that the Supreme Court is no longer committed to protecting the rights of the innocent employees from abuse by employers and/or unions in the area of labor-management relations.

AS TO THE FIRST QUESTION RAISED BY PETITIONERS, both of the lower court opinions noted that the employees lost pension and other benefits; neither of the opinions faced the fact that the employees also lost "the monies which they had contributed to the pension fund for over fifteen (15) years, not to mention interest." In other words, through this device of change of form, the approximately one hundred twenty (120) employees of Dependable each lost "out-of-pocket money" in the approximate amount of $10,000.00 or a total loss to the 120 employees of over $1,200,000.00 not to mention the interest on this money during the years.

This Court, as well as the lower courts, has steadfastly and consistently protected the rights of individuals from this type

of action over the years and has created such legal theories as "unjust enrichment", "estoppel", "piercing the corporate veil" and other equity theories to prevent the wholesale sellout of the rights of individuals by other third parties. The facts in this case cry out for such relief, but the lower court opinions have ignored the equities, relying on technicality and form. Although the equities in the case are the case, the lower courts concerned themselves with whether the petitioners should have gone to the forum of the N.L.R.B. and other collateral issues instead of meeting the real issue head on. When the petitioners went to the N.L.R.B. prior to obtaining counsel, they were advised to get private counsel and bring suit in court.

Petitioners state to this Court that the "sole basis for the decisions of the lower courts" was the single fact that Sears "did not sign any contract between "DAS and Local 610." In making the decision, the Eighth Circuit recognized that "there is an indication that DAS may have been formed because of labor relations problems experienced by Sears" and some of the other overpowering evidence that Dependable was merely a front for Sears. However, neither the trial court nor the Eighth Circuit considered the 1970 occurrence when Sears tried to give this "appliance service work" to Local 688 of the Teamsters under a "secret addendum"; in 1970, Local 610 knew who the real party in interest was because they went directly to Sears labor relations people to enforce the contract. As a result, the contract was enforced and Local 610 had jurisdiction over the appliance service work; in other words, Local 610 enforced the DAS-Local 610 contract against Sears back in 1970, but the lower courts state in their opinion that the contract cannot be enforced against Sears.

In summary, petitioners state that the lower courts were so concerned with the form that they missed the substance; it matters little whether relief is granted on the theory of co-employer, successor employer (incidentally, the lower courts did find Sears

was a successor), unjust enrichment, estoppel, piercing the corporate veil or another theory. As this Court stated in *Vaca v. Sipes*, supra, "the court must fashion an appropriate remedy."

AS TO THE SECOND QUESTION RAISED BY PETITIONERS, the decision of the lower ccurts in this case is an implied overruling of *Vaca v. Sipes*, supra, and the majority of the subsequent case law in the area of "breach of the duty of fair representation". The decision of the lower courts represents a giant step backwards which the lower courts base on the technical questions of *"unfair labor practice preempted by the N.L.R.B."* (it is interesting to note that this argument was raised in the *Vaca* case, but rejected by this Court when it stated "The employees' suit against the employer, however, remains a 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself"); *"conspiracy allegations over which courts do not have jurisdiction"* (Petitioners argued strenuously in the Eighth Circuit that "the evidence of conspiracy or whatever" was presented to show a breach of the duty of fair representation, but the Eighth Circuit opinion disposes of the evidence on the technical ground. Certainly Local 610 would be guilty of a breach of the duty of fair representation if "it made an under the table deal to force the employees into Local 688", but the Eighth Circuit Opinion holds this is not true since a conspiracy might be involved); *"the old, outdated argument of 'non-feasance versus malfeasance' as to liability for breach of the duty of fair representation"* (Petitioners argued strenuously in this case that Local 610 had a duty of fair representation to the employees in the negotiation, administration and enforcement of the contract between Dependable operation and Local 610; but the Eighth Circuit held that Local 610's contract was not arbitrary, discriminatory or in bad faith because Harland Horn

did not recall any discussion with Local 610 members concerning the successor clause. The evidence in this case was overwhelming and basically undisputed that *Local 610, during August and September, 1974* (during this period of time, it cannot be disputed that the Dependable operation was in existence, the petitioners were working every day for the Dependable operation, the petitioners were working under the Dependable-Local 610 contract which was in full force and effect, Local 610 was the exclusive bargaining representative for petitioners and owed them the statutory duty of fair representation and Sears was in existence) *not only failed and refused to represent petitioners by failing to enforce the contract, by failing to advise the petitioners, by refusing to accept grievances and generally by abjectly failing to protect the rights of petitioners; but also affirmatively abandoned petitioners and coerced petitioners into Local 688 by threats, lies and gross misrepresentation.* The courts below virtually ignored this evidence by reverting to the problem of preemption and by referring to the state of facts after "discontinuation of business by DAS and employment by Sears of the former DAS employees"; the issue in this case was whether Local 610 fulfilled its duty of fair representation "prior to DAS ceasing operations" by exercising complete good faith and honesty of purpose in protecting the rights of petitioners, protecting their very livelihoods as well as the over $1,000,000.00 in employee contributions to the pension fund; unfortunately for petitioners, the lower courts missed, sidestepped and refused to decide this issue) and other questions of form, ignoring the substance.

In summary, petitioners state that the lower courts in this case have completely rejected *Vaca* AND HELD THAT THERE IS NO SUCH THING AS A DUTY OF FAIR REPRESENTATION.

AS TO THE THIRD QUESTION RAISED BY PETITIONERS, the decision of the lower courts in this case basi-

cally overrules the decisions of this Court in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *N.L.R.B. v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 92 S.Ct 1571, 32 L.Ed.2d 61 (1972), and other cases concerned with the question of successor employers. This Court stated that although a successor employer may not be bound to all of the substantive terms of the predecessor's collective bargaining agreement, *the successor is definitely bound to the arbitration provisions.* In reviewing the impact of the successor doctrine of the Supreme Court, the writer of the article stated that although the Supreme Court had limited itself to committing the successor to "arbitrate under the predecessor agreement" and to "bargain with the union", this had the practical effect of enforcing the predecessor contract since the successor would rather negotiate than have an arbitrator make his contract for him. *57 Minnesota Law Review 1051.*

The case brought by petitioners, both as to the contract question and the fair representation question, was based on pronouncements and statements of this Court of what the national labor policy was; for example, in *Wiley*, supra, this Court stated:

> "employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." (376 U.S. at 549)

The decision of the lower courts in this case, if permitted to stand, overrules the *Wiley* decision because the lower court hold-

ing is that petitioners must be denied the remedy against the successor for the reason that the union did not request or demand arbitration or bargaining. This Court enunciated a policy to protect employees, such as petitioners, from potentially great disadvantage; the remedy is thus for the employees. *However, the Eighth Circuit is holding that if the union breaches its duty of fair representation and does not seek arbitration, does not seek negotiation and does not bring suit, then the employees, for whom the remedy was created, are barred from any relief.* Petitioners state that this Court cannot allow this type of frustration of national labor policy to exist.

In summary, petitioners state that the lower courts have used the national labor policy of *Wiley* against employees for whom the remedy was created.

CONCLUSION

By reason of the foregoing, petitioners respectfully submit that this petition for a writ of certiorari should be granted due to this being a case of first impression and due to the national labor policy being frustrated and disregarded and the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

DANIEL P. REARDON, JR.
411 North Seventh—Suite 1401
St. Louis, Missouri 63101
Attorney for Petitioners

OF COUNSEL:

KENNETH V. BYRNE
411 North Seventh Street
St. Louis, Missouri 63101

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

76-1702 September Term, 1976

Alfred Russon, et al., Appellants, vs. Sears Roebuck and Company, etc., et. al., Appellees.	Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 20, 1977

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1702

Alfred Russom, et al., Appellants, v. Sears, Roebuck and Co., a corporation, and Local 610, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 688, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellees.	Appeal from the United States District Court for the Eastern District of Missouri

Petition for Rehearing and Suggestions for a Rehearing in Banc

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, appellants, Alfred Russom, et al., hereby seek and pray a rehearing and suggest a rehearing in banc with respect to the decision of the Court filed on June 29, 1977.

I

A rehearing in banc is sought and prayed because the decision filed on June 29, 1977 is not in conformity with other decisions of this circuit under Rules 35(a)(1) and for the further reason that the "question presented is of exceptional, if not unique importance" in the sense of Rule 35(a)(2). If the decision is not changed, this decision (a) will create a jurisdictional anomally in labor-management relations law, (b) will effectively abolish and emasculate the established doctrine of "fair representation", (c) will effectively abolish and emasculate the established doctrine of "successor employer" and (d) will be a signal to both unions and management that the courts will not protect the helpless persons in these situations, the employees.

The cause of the infirmity in the decision is that the two primary conclusions of the court must rest on states of the law which are in contradiction to decisions of this circuit and decisions of the Supreme Court.

Basically, the action was brought as a class action[1] on behalf of all employees of DAS-Sears and members of Local 610 against their employer and unions for wrongful breach of contract and for wrongful breach of the duty of fair representation pursuant to Section 301 of the amended National Labor Relations Act, 29 U.S.C. 185. Following an "abbreviated non-jury trial",[2] the trial court found in favor of both defendants. On appeal, this court affirmed the decision of the trial court while "looking the other way" at both the evidence and the law governing this case.

II

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 77 S.Ct. 903, 17 L.Ed. 2d 842 (1967), in establishing and broadening the "fair representation theory" clearly mandated that the remedy must be provided for *an employee who suffers damage*

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[1] The trial court denied the class action which was also affirmed.

[2] The trial court severely limited testimony which was also affirmed.

by actions of his employer and who is abandoned by his union. In the decision, this court was faced with clear, cogent and undisputed evidence of capitulation and abandonment by defendant Local 610, but somehow arrived at the erroneous conclusion that this total abandonment was not a breach of the duty of fair representation.

The Court cited an Eighth Circuit opinion in *Emmanuel v. Omaha Carpenters District Council,* 535 F. 2d 420 (8th Cir. 1976). Appellants respectfully submit that the language used by this circuit in that opinion is in direct conflict with the decision in the instant case. In the *Emmanuel* decision, this Court stated that the union's duty of fair representation is a statutory one, requiring the union to serve the interests of all the members without hostility or discrimination both in the conduct of collective bargaining and in the enforcement of the resulting agreement. Going further concerning the possible waiving of provisions of a collective bargaining agreement, *this court stated that on the face of it, such an agreement would lack good faith and honesty of purpose.*

This court, in the case of *Minnis v. Intern. U., United Auto., Aerospace, etc.,* 531 F. 2d 850 (8th Cir. 1975), stated that the "utter failure by the unions to make even a minimal attempt to investigate or process his grievance" would support an "inference of bad faith and arbitrary and capricious conduct", stating that a union must act with "complete good faith and honesty of purpose". This language again is in direct conflict with the decision in the instant case and ironically, this court was willing to insure that one employee received fair representation in *Minnis* while not being willing to apply that same duty in the instant case where over one hundred twenty employees lost their livelihoods.

This court, in the case of *Butler v. Local 823, Int'l Brotherhood of Teamsters,* 514 F. 2d 442 (8th Cir. 1975), stated that the duty of fair representation definitely included the duty to

"insist that the employer adhere to the contract" and further stated that a breach of the duty could be found in the fact that the "union acquiesced in an irrational interpretation." This language again is in direct conflict with the decision in the instant case where this court had to hold that the union's acquiescence and abandonment did not constitute a breach of the duty of fair representation. Almost unbelievably, the court in the instant case stated that "substantial evidence supporting the finding of no breach of the duty of fair representation" consisted of "an officer of Local 610 testifying that he did not recall any discussion concerning the successor clause, that he did not refuse to accept grievances, that he believed Local 688 had jurisdiction over the service employees after discontinuance of business by DAS and employment by Sears of the former DAS employees" (Page 5 of Decision). First of all, there is a *serious error in the decision* since the above statement and footnote 5 assume that Horn made this statement and decision "after the employees accepted employment with Sears"; footnote 5 states "A majority of the DAS employees signed Local 688 authorization cards after they accepted employment with Sears". This is a misstatement since the undisputed evidence was that *"the authorization cards were signed at a meeting on September 23, 1974, at a time when the DAS-Local 610 agreement was still in full force and effect and at a time when DAS was still in business."* The other "evidence" which the decision referred to ignored the undisputed evidence from Mr. Horn's own mouth that he did not "recall a meeting on September 9, 1974" which is the meeting at which the employees testified that they asked about the successor clause and at which time they stated they desired to file grievances. It ignores the undisputed testimony of Mr. Gamache, a Local 688 officer, that he did not feel that "Local 688 had jurisdiction" and the stipulation filed in Court prior to trial admitting that Local 610 had jurisdiction. It further ignores the undisputed testimony of Mr. Vaughn, the business representative of Local 610, who stated that *"he recalled that the people raised the question of the 'successor' clause at the*

meetings" and further stated that "he may have told 'Toll and others' that they should not have signed the Local 688 authorization cards while the Local 610-DAS contract was still in effect." Although Vaughn was the paid business agent of the appellants, he did not advise them because "Horn was there."

This court, in the cases of *Richardson v. Communications Workers*, 443 F. 2d 974 (8th Cir. 1971) and *Bond v. Local Un. 823, Int. Bro. of T., C., W. & H. of America*, 521 F. 2d (8th Cir. 1975), stated that the duty of fair representation was in the nature of a "fiduciary duty" and required "complete good faith, honesty of purpose and the avoidance of any semblance of arbitrary conduct." These decisions are in direct conflict with the instant decision in that a "fiduciary" definitely could not capitulate or abandon his trust and the action of Local 610 *in abandoning the Local 610-DAS contract without negotiation, request to bargain, request for arbitration or without even filing a grievance is definitely not only arbitrary, but capricious action and inaction.* This set of facts in the instant case definitely represents the "utter failure" spoken of by this circuit in prior decisions.

In summary, the decision of June 29, 1977 must be reexamined and changed to comply with decisions of the Supreme Court and with prior decisions of this circuit on the issue of fair representation.

III

An even more disturbing part of the decision concerns the question of successor employer and the implications created by the finding of the status of successor. In the instant case, this court found that there was definitely the relation of successor; although appellants raised the issues of co-employer, alter ego and so on, there was no argument about the successor relationship of defendant Sears.

The Supreme Court, in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964), and *N.L.R.B. v. Burns In'tl Security Servs., Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), clearly established that although a successor employer may not be bound to all the substantive terms of the predecessor's collective bargaining agreement, said employer *is definitely bound to the predecessor's collective bargaining agreement's arbitration provisions.* In subsequent cases, this doctrine has not been changed or modified to any great extent and there can be *no doubt that Wiley was held even though a non-signatory;* the instant decision is directly in conflict with the *Wiley* case when the opinion states on p. 8 that "Most significantly, the record reflects that Sears did not sign any contract." In the *Wiley* case, there was no suggestion of any ulterior motives while in the instant case, this court found that there "was an indication that DAS was formed due to labor relations problems; Mr. Baumler, Owner of DAS, was a 16 year employee of Sears; substantially all of DAS business was with Sears" plus much other evidence set out in appellants' brief, but not mentioned in the decision.

As the Supreme Court stated in *Wiley*, the national labor policy encompasses the following:

> "employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the *well-being of the employees*, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. *The objectives of national labor policy*, reflected in established principles of federal law, *require* that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by *some protection to the employees from a sudden change in the employment relationship.*"

In journal article stressing the importance of this doctrine and examining it, *57 Minnesota Law Review 1051*—the writer reviewed the cases and stated that in his examination, he had found that although the Supreme Court had limited itself to committing the successor employer to "arbitrate under the predecessor agreement" and to "bargain with the union", *this had the practical effect of enforcing the predecessor contract since the successor was obligated to arbitrate and was obligated to bargain.*

With this precedent, the instant decision has nevertheless been rendered which states in effect that the employer, Sears had no responsibility and has no responsibility which is a frustration of the national labor policy as set out in *Wiley*.

What is the real effect of this decision? The real effect is to state the following theory for a situation of this type. *First, if the union sues for enforcement of the arbitration provision of the predecessor agreement, for an order to bargain or for other relief*, the courts will give a remedy under *Wiley, Burns* and other cases which hold that *a successor is bound whether he signed the contract or not.*

However, in the second instance, if the union does nothing and even if the union abandons its member-employees, the court will not give the remedy to the employees under *Wiley, Burns* and other cases. Appellants respectfully submit that this "abandonment by the union" should not and cannot be allowed by this court or any court to bar a remedy. Although *Wiley* and *Burns* involved actions by unions for arbitration and for order to bargain, the Supreme Court made it very clear in the quoted section that the whole purpose of the "objectives of national labor policy" was to protect the "Well-being of the employees" and to afford "some protection to the employees" in cases involving successor employers. *This decision cannot stand as this would effectively deny the employees the protection afforded while giving it to the union.*

For Local 610 to capitulate and abandon the employees, appellants, at a time when the DAS-Local 610 contract was timely and in existence, knowing or charged with knowledge of the *Wiley* and *Burns* decisions, Local 610 is not only guilty of breach of duty of fair representation by using arbitrary and capricious methods, but is also guilty of the "utter failure to make even a minimal attempt" and is guilty of "waiving provisions of collective bargaining agreement which on the face of it, lacks good faith and honesty of purpose." When you add to this the "questionable motives", involving two locals of same international as well as the substantial monies to be saved by the union, then any court must consider the question of capriciousness and punitive damages.

IV

The decision of this court further must be reexamined since this court applied the "limited scope of review" to its decision even though the appellants made it clear that the scope of review must necessarily have been broader in the instant case due to the trial court's severe limitation on "live testimony" (trial court did not want testimony unless it was not in the depositions), due to trial court's severe limitation on number of witnesses and due to trial court's not having benefit of trial transcript because trial court refused request of appellants to obtain transcript prior to submission of written after-trial briefs.

Although a question concerning scope of review was asked at oral argument and appellees had to admit that scope might be broader due to above circumstances, the decision states that "limited review" was used.

V

The decision of this court must be changed due to "errors in the decision".

The first serious "error" is very material to the whole decision; the decision in discussing "the signing of cards authorizing Local 688" does not consider the fact that the cards were signed both when the DAS-610 contract was still in existence and when DAS was still in business.

The second serious error states that 688 was the "bargaining agent of service employees of Sears"; *this is not true as Sears had no service employees.*

In footnote 4, Local 688 had authorization cards prior to time DAS ended its business.

VI

For the above reasons, as well as other points raised in the briefs, it is respectfully urged and submitted that the court reconsider its June 29, 1977 decision, and/or that rehearing in banc be ordered. Appellants respectfully urge and submit this action is necessary in this case because the decision as it now stands is in direct conflict not only with prior decisions of this circuit, but also in conflict with decisions of the Supreme Court.

Respectfully submitted,

/s/ KENNETH V. BYRNE
Attorney for Appellants, Petitioners
411 North 7th—Suite 1401
314-421-0390
St. Louis, Missouri 63101

APPENDIX C

Statement of Errors in Eighth Circuit Opinion

Petitioners point out the following errors in the Opinion for the reason that petitioners feel these "serious errors" resulted in the erroneous decision:

1) page 2 of Opinion—A majority of the former DAS employees signed cards authorizing representation by Local 688, the bargaining agent of service employees of Sears".

This statement is erroneous in that the evidence was that the former DAS employees were told they had to sign the Local 688 authorization cards at a time, September 23, 1974 when they were still DAS employees; further, Local 688 was not a bargaining agent of service employees of Sears because Sears did not have any service employees until they hired the DAS employees.

2) page 5 of Opinion—Footnote 5 states "A majority of the DAS employees signed Local 688 authorization cards after they accepted employment with Sears."

This statement is erroneous in that the evidence definitely proved that "the Local 688 authorization cards" were signed under duress and were signed on September 23, 1974 when the people were still employed by DAS.

3) page 7 of Opinion—"DAS was in total control of the wages, hours, working conditions and fringe benefits of its employees. DAS hired and fired its own employees and maintained its own personnel records."

This statement is erroneous in that the evidence clearly showed that DAS hired and fired at the request of Sears, worked over-

time at the request of Sears; additional examples of control abound in the evidence.

4) page 8 of Opinion—"Most significantly, the record reflects that Sears did not sign any contract between DAS and Local 610 and that Sears did not participate in any labor negotiations which preceded formation of such a contract."

This statement is erroneous in that the evidence clearly showed that although Sears labor people did not sit at the table, Sears definitely did participate in labor negotiations and even grievances.

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 76-1702

Alfred Russom, et al.,
Appellants,
v.
Sears, Roebuck and Co., a Corporation, and Local 610, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 688, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: May 17, 1977

Filed: June 29, 1977

Before Stephenson and Webster, Circuit Judges, and Benson,* District Judge.

Stephenson, Circuit Judge.

This appeal involves claims initiated by Alfred Russom and other individuals against Teamsters Local 610, Teamsters Local 688 and Sears, Roebuck and Co. pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). In

* The Honorable Paul Benson, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

general, the complaint alleges that Local 610 breached its duty of fair representation, that Sears breached a collective bargaining agreement, and that all three defendants engaged in a conspiracy to deprive union members of pension and seniority benefits. The district court,[1] sitting without a jury, entered judgment in favor of the defendants, and we affirm.

The facts are detailed comprehensively in the district court's opinion and need only be briefly summarized. *See Russom v. Sears, Roebuck and Co.*, 415 F. Supp. 792 (E.D. Mo. 1976). In 1956 Dependable Appliance Service, Inc. (DAS) was formed for the purpose of providing service for home appliances. DAS performed substantially all of its business for Sears. In 1974 the president and owner of DAS, John Baumler, decided to retire and cease business operation of DAS. Baumler's retirement was motivated by reasons attributable to his death and age. Sears and Local 610, the representative of the DAS employees, were informed of his decision. Sears subsequently determined to establish its own appliance service department and offered employment to the DAS employees. Sears purchased some of the DAS assets.

When DAS terminated its business operation, the employees recived severance pay. Substantially all of the employees then accepted employment with Sears. A majority of the former DAS employees signed cards authorizing representation by Local 688, the bargaining agent of service employees of Sears.

It is undisputed that the DAS employees lost important benefits through their termination with DAS and subsequent employment with Sears. The DAS-Local 610 collective bargaining agreement had required that DAS contribute to the Teamsters' pension fund, but the employees' rights in the fund would not have vested until 1978. When DAS ceased operation the em-

[1] The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

ployees lost their pension rights. After employment with Sears, the former DAS employees entered into negotiations through Local 688 toward a new collective bargaining agreement, and a contract was ultimately approved by a majority of the employees on February 13, 1975. This agreement, however, did not provide for contribution by Sears to the Teamsters' pension fund,[2] and the former DAS employees were not given seniority status from the date of their employment with DAS.

Alfred Russom and other former DAS employees filed their claims under section 301 on the basis of these lost employment benefits. They maintain that Sears was bound to the DAS-Local 610 collective bargaining agreement because it allegedly controlled the operation of DAS as a co-employer, that Sears breached the agreement, that Local 610 refused to enforce their rights under the contract, and that Local 688 assisted Sears and Local 610 in depriving the former DAS employees of their pension and seniority benefits.

The district court, sitting without a jury, found that Sears and DAS were not co-employers but that Sears was a successor employer to DAS. The trial court concluded that Sears was not bound by the provisions of the DAS-Local 610 collective bargaining agreement. The district court further found that Local 610 may have acted erroneously in failing to demand bargaining or arbitration with Sears but that Local 610 did not breach its duty of fair representation by acting arbitrarily or in bad faith. The Court also concluded that it did not have jurisdiction over the conspiracy allegation.[3] This appeal followed.

[2] Sears had never agreed to make contributions to the pension fund.

[3] Courts are not vested with jurisdiction to review claims of conspiracy to violate either a labor contract or an individual's rights under the Labor Management Relations Act. *See Abrams v. Carrier Corp.*, 434 F.2d 1234, 1253 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). *Cf. Woody v. Sterling Aluminum Products, Inc.*, 365 F.2d 448, 456 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967). In any event, we are satisfied there is insufficient evidence of a conspiracy.

I

Appellants contend the trial court's finding, that Local 610 did not breach its duty of fair representation, is clearly erroneous. More specifically, appellants emphasize that the DAS-Local 610 collective bargaining agreement contained a successor clause which bound Sears to the terms of the contract and that Local 610 would not accept grievances on behalf of DAS employees seeking to invoke the successor clause.[4]

A breach of the duty of fair representation occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). *See Emmanuel v. Omaha Carpenters District Council*, 535 F.2d 420, 423 (8th Cir. 1976); *Richardson v. Communications Workers*, 443 F.2d 974, 978-85 (8th Cir. 1971). Moreover, our scope of review in this appeal is limited. A trial court's findings are clearly erroneous "only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *St. Louis Typographical Union No. 8 v. Herald Co.*, 402 F.2d 553, 557 (8th Cir. 1968).

The DAS employees lost valuable pension and seniority rights when their employment with DAS was terminated and they accepted employment with Sears under a new collective bargaining agreement. Some evidence in the record also suggests that DAS employees wanted to assert their rights under the DAS-Local 610 contract against Sears under the successor clause in the agreement. For example, Thomas Roach, a former DAS employee, testified that he attempted to file a grievance

[4] Appellants also claim that Local 688 participated in the deprivation of their pension and seniority benefits. Our inquiry in this section 301 suit, however, necessarily focuses upon the conduct of Local 610 and Sears. Local 688 was not the bargaining representative for appellants when DAS ended its business.

but that the Local 610 representative, Harland Horn, would not accept any grievances.

The record reveals substantial evidence which supports the trial court's finding that Local 610's conduct in failing to demand collective bargaining with Sears when DAS went out of business and in failing to rely upon the successor clause was not arbitrary, discriminatory or in bad faith. Harland Horn, secretary-treasurer of Local 610, testified that he did not recall any discussion with Local 610 members concerning the successor clause and that he did not refuse to accept grievances. Horn also stated that he believed Local 688 had jurisdiction over the service employees after discontinuation of business by DAS and employment by Sears of the former DAS employees.[5]

Furthermore, Sears was not a signatory to the DAS-Local 610 collective bargaining agreement. A successor employer is not bound by the substantive provisions of a collective bargaining agreement negotiated by its predecessor but not agreed to or assumed by the successor. *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 273, 281-91 (1972). *Cf. John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-51 (1964). The record supports the trial court's finding that Sears was not bound to the provisions of the contract entered into by DAS and Local 610. *See* part II *infra*. Even assuming Sears were to some extent bound under the collective bargaining agreement, Local 610's failure to enforce the contract would not constitute *ipso facto* a breach of the duty of fair representation. Mere errors in judgment are insufficient to support a claim of breach of the duty of fair representation. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976).[6]

[5] A majority of the DAS employees signed Local 688 authorization cards after they accepted employment with Sears.

[6] The district court concluded that Local 610's failure to request arbitration with Sears arguably constituted an unfair labor practice

II

Appellants also contend the trial court's finding, that Sears was not bound under the DAS-Local 610 contract, is clearly erroneous. Emphasizing the interrelationship between the business of Sears and DAS, appellants assert that Sears is liable under the agreement as a co-employer. According to appellants, all DAS functions were effectively controlled by Sears.[7]

Unquestionably, the business relationship between Sears and DAS was close and to some extent interconnected. For example, there is an indication that DAS may have been formed because of labor relations problems experienced by Sears. Mr. Baumler, the owner of DAS, had been employed previously by Sears for over 16 years. Substantially all of the DAS business was conducted with Sears. The initial employees of DAS were trained by Sears, and additional training was provided by Sears without charge. On service calls DAS employees wore Sears patches on their uniforms and drove trucks bearing a Sears logo. DAS employees received a 10% discount at Sears and participated in numerous contests for Sears employees. Most recently, DAS and Sears operated under a cost-plus arrangement;

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but that such a claim was preempted by the National Labor Relations Act, 29 U.S.C. §§ 157 and 158. We agree. Local 610 may have refused to bargain collectively with an employer, which is violative of section 8(b)(3), but the proper forum to litigate such a claim is a proceeding before the National Labor Relations Board.

[7] The doctrine of co-employer status was developed by the National Labor Relations Board to determine the existence of an employer-employee relationship. Sears asserted at trial that the jurisdiction of the NLRB preempts any determination of co-employer status in a section 301 suit. The district court stated that "jurisdiction may exist to determine whether or not Sears and DAS were co-employers" and proceeded to determine that there was no co-employer relationship. 415 F. Supp. at 796. Because Sears was not a signatory to the DAS-Local 610 contract, we are concerned about the viability of the section 301 claim brought in the instant case. *See Baker v. Fleet Maintenance, Inc.*, 409 F.2d 551, 554 (7th Cir. 1969). Nonetheless, in light of the close relationship between Sears and DAS, we believe the district court did not act improperly in deciding whether a co-employer relationship existed.

Sears would reimburse DAS for its costs and ensure a profit margin. Both the management and employees of Sears and DAS maintained an interrelated working relationship.

The record contains substantial evidence, however, which supports the district court's finding that Sears and DAS were not co-employers. Neither company owned any stock in the other. There were not any interlocking officers or directors. DAS was in total control of the wages, hours, working conditions and fringe benefits of its employees. DAS hired and fired its own employees and maintained its own personal personnel records. DAS paid its own liability and workmen's compensation insurance and owned and operated its own trucks and equipment. Although Sears may have made some suggestions concerning operation of DAS, the DAS management made its own decisions. Because DAS serviced appliances for Sears' customers, cooperation between the two companies was obviously necessary. Most significantly, the record reflects that Sears did not sign any contract between DAS and Local 610 and that Sears did not participate in any labor negotiations which preceded formation of such a contract. The evidence supports the trial court's finding that Sears was not bound under the DAS-Local 610 collective bargaining agreement as a co-employer.[8]

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

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[8] Appellants also contend the trial court committed certain procedural errors including the denial of their motion for a class action, denial of their request for a transcript prior to submission of post-trial briefs, and restriction on the scope of testimony (particularly by limiting testimony to matters not covered in depositions). If not entirely proper, the trial court's rulings on these matters either were not an abuse of its discretion or were not inconsistent with substantial justice.

APPENDIX E

United States District Court
Eastern District of Missouri
Eastern Division

Alfred Russom, et al.,
Plaintiffs,
vs.
Sears, Roebuck & Company, et al.,
Defendants.
No. 75-524 C (4)

Order

(Filed June 25, 1976)

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants shall have judgment against plaintiffs at plaintiffs' costs.

/s/ John P. Nangle
United States District Judge

Dated: June 25, 1976.

APPENDIX F

United States District Court
Eastern District of Missouri
Eastern Division

Alfred Russom, et al.,
Plaintiffs,
vs.
Sears, Roebuck & Company, et al.,
Defendants.
No. 75-524 C (4)

Memorandum

(Filed June 25, 1976).

Plaintiffs brought suit, pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that defendant Sears, Roebuck & Company breached a collective bargaining agreement; that defendant Local 610 refused to accept grievances; and that all three defendants conspired to deprive plaintiffs of certain rights.

The case was tried before the Court without a jury. The Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, the stipulations of the parties, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure:

Findings of Fact

1. Plaintiffs are all presently service employees of defendant Sears, Roebuck & Company. Prior to October 1, 1974 plain-

tiffs were all employees of Dependable Appliance Service, Inc. [DAS].

2. Defendant Sears, Roebuck & Company is a corporation engaged in a retail sales business which includes in part the sale and service of home appliances.

3. Defendant Local 688, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.* and is the exclusive bargaining agent of service employees of Sears, Roebuck & Company.

4. Defendant Local 610, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.* and was the exclusive bargaining agent of the employees of DAS.

5. In 1956 DAS was formed for the purpose of providing service work for existing companies. DAS was organized before any service work was secured. Throughout its existence, DAS did substantially all of its business with Sears, Roebuck & Company. Sears trained DAS's initial workforce and from time to time throughout DAS's existence, its employees received additional training from Sears. There was no charge to DAS for this training.

6. Originally there was an hourly billing rate in existence between DAS and Sears. This changed, however, to a cost-plus system in which all cost items were passed on to Sears.

7. DAS employees were not paid by a check from Sears. Credible evidence established that Sears did not participate in labor negotiations between DAS and Local 610, nor did Sears ever sign any contract entered into by Local 610 and DAS. The evidence fails to establish that any employee of Sears was

an officer or director of DAS or that any employee of DAS was an officer or director of Sears. Sears did not own stock in DAS, nor did DAS own stock in Sears. DAS maintained its employee records, which were never shown to Sears. DAS was in charge of the wages, hours and fringe benefits of its employees. DAS provided its employees liability and workmen's compensation insurance. DAS had control over the hiring and firing of its employees.

8. DAS employees did receive a 10% discount at Sears and in addition, were included in certain employee contests. DAS employees, in response to service calls, went to the homes of persons who had Sears appliances in need of repair. DAS employees greeted customers with "Sears Calling" and, if the customers were not home, left a Sears "Not-Home" tag.

9. DAS employees wore a Sears "Authorized Service" patch on their uniforms. DAS trucks bore a Sears Logo and slogan and were painted in Sears "fleet colors". The trucks also bore the name of DAS.

10. In late 1970, Sears desired to hire two service employees itself, to be assigned to in-house repairs. An agreement was reached permitting Sears to hire the two employees, who were represented by Local 688 and were covered by a supplemental addendum to the collective bargaining agreement between Local 688 and Sears. After the two men were hired and the collective bargaining agreement was supplemented, in early 1971, DAS employees objected to Local 688 representing any service or repair men. After the President of the Joint Council of Teamsters No. 13 was contacted, it was determined that rightful jurisdiction belonged to Local 610. Accordingly, Sears agreed to terminate the employment of the two individuals. These two individuals were subsequently hired by DAS. The addendum, covering service employees, however, remained in effect.

11. On September 9, 1974 a meeting was held at which it was announced that DAS would be going out of business. The

decision was reached solely by John O. Baumler, the president of DAS, because of Mr. Baumler's age and health. It was indicated that Sears would offer employment to the DAS employees. There is some evidence that the successor clause in the DAS-Local 610 collective bargaining agreement was discussed, with the union indicating that the addendum clause in the Sears-Local 688 agreement precluded application of the successor clause in the DAS-Local 610 agreement. There was also evidence that some DAS employees, specifically plaintiff Roach, tried to file a grievance. Local 610, however, indicated that it could accept no grievances.

12. At a subsequent meeting on September 23, 1974, representatives from Local 688 were present. Local 688 informed the DAS employees that they would have to join Local 688 if they wanted to be represented by a union while employed at Sears. A majority of the DAS employees signed Local 688 authorization cards.

13. On October 1, 1974, Sears offered employment to substantially all of the ex-DAS employees. These offers were accepted nearly unanimously.

14. Sears purchased some, but not all, of DAS's assets.

15. When DAS went out of business, the employees received severance checks. None of the plaintiffs have offered to return the same to Sears.

16. While DAS was in existence, and in accordance with the DAS-Local 610 collective bargaining agreement, DAS made payments on behalf of its employees to the Teamsters Pension Fund. The DAS employees' rights in said fund were not to vest until 1978. Accordingly, when DAS terminated its business, the DAS employees, and plaintiffs, lost their rights in said pension.

17. Local 688 and Sears had a number of bargaining sessions concerning the newly hired DAS employees from October 3,

1974 through February 13, 1975. The proposed contract was presented to the service employees (ex-DAS employees) at a meeting on February 13, 1975. The entire proposed contract was read to the employees. A majority voted by secret ballot to accept the contract, although there was testimony that some employees felt pressured into accepting the proposed contract. The contract, which was approved, did not provide for continued contributions by Sears to the Teamsters Pension Funds. (Sears has never contributed to such a pension fund), nor were the ex-DAS employees given seniority status from the date of their employment with DAS for benefit purposes.

Conclusions of Law

This Court has serious reservations concerning its alleged jurisdiction herein. Plaintiffs are proceeding on the basis of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In view of these concerns, the Court will analyze its jurisdiction in relation to each of the theories on which plaintiffs have proceeded herein.

As to plaintiffs' allegations of conspiracy, the Court concludes the jurisdiction is clearly lacking. *Abrams v. Carrier Corporation*, 434 F.2d 1234 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); *Woody v. Sterling Aluminum Products, Incorporated*, 365 F.2d 448, 456 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967).

The Court, however concludes that jurisdiction may exist to determine whether or not Sears and DAS were co-employees, the theory upon which plaintiffs have proceeded. *Cf., Baker v. Fleet Maintenance, Incorporated*, 409 F.2d 551 (7th Cir. 1969). But see, Morris, The Developing Labor Law 767 (1971) ("The Board has the duty of determining whether the relationship between certain parties constitutes an employer-employee relationship . . ."); *Motor Coach Employees v. Lock-*

ridge, 403 U.S. 274 (§ 301 jurisdiction exists as to claimed breaches of the duty of fair representation and other breaches grounded in the collective bargaining agreement itself). It is plaintiffs' contention that Sears, as a co-employer, should be bound by the substantive terms of the DAS-Local 610 collective bargaining agreement once DAS ceased doing business. The evidence establishes, however, that Sears can not be considered a co-employer with DAS.

The doctrine of co-employer originated with the National Labor Relations Board in the context of determining whether the Board would exercise jurisdiction over the particular dispute. See *Radio & Television Broadcast Technicians Local Union 1264, International Brotherhood of Electrical Workers, AFL-CIO v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Sakrete of Northern California, Inc. v. National Labor Relations Board*, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). The criteria employed to determine if two employers are in fact to be considered as co-employers include the following:

1. Interrelation of operations;
2. Centralized control of labor relations;
3. Common management; and
4. Common ownership or financial control.

No one of these factors has been held to be controlling but the Board opinions have stressed the first three factors, which go to show 'operation integration', particularly centralized control of labor relations. *Sakrete of Northern California, supra* at 905, fn.4.

See also *Radio & Television Broadcast Technicians, supra* at 256; *Local No. 627, International Union of Operating Engineers, AFL-CIO v. National Labor Relations Board*, 518 F.2d 1040 (D.C.App. 1975), app. filed, 44 U.S.L.W. 3502 (1976);

Cowles Communications, Inc., 170 N.L.R.B. 1956 (1968); *National Labor Relations Board v. Greyhound Corporation*, 368 F.2d 778 (5th Cir. 1966); *Miami Newspaper Pressmen's Local No. 46 v. National Labor Relations Board*, 322 F.2d 405 (D.C.App. 1963); *Bachman Machine Company v. National Labor Relations Board*, 266 F.2d 599 (8th Cir. 1959).

The evidence was clear that there was no centralized control of labor relations. DAS handled its own labor relations, entered into negotiations and concluded its own agreements, without the involvement of Sears. Furthermore there was no common ownership or financial control. See *Hychem Constructors, Inc.*, 169 N.L.R.B. 274 (1968); *Space Services International Corporation*, 156 N.L.R.B. 1227 (1966); *Westinghouse Electric Corporation*, 163 N.L.R.B. 914 (1967) (all indicating that the existence of a cost-plus pricing arrangement does not indicate a co-employer status). The Court further concludes that the evidence fails to establish common management and interrelation of operations. The fact that DAS employees wore Sears patches, greeted customers with "Sears Calling" and left Sears "Not-Home" tags is not persuasive. The customers had called Sears seeking repairs for their appliances. These customers could not possibly know of the arrangements between Sears and DAS, nor would the customers be likely to open their doors to DAS servicemen after calling Sears. Accordingly, the Court concludes that Sears and DAS were not co-employers of plaintiffs herein.

Plaintiffs have failed to argue that Sears was a successor employer. In *John Wiley & Sons v. Livingston*, 376 U.S. 542 (1964), the Court held that under certain circumstances a successor employer might be required to arbitrate with the union under the agreement entered into by the employer's predecessor. Crucial to the determination of whether the duty to arbitrate survives is whether there is "any substantial continuity of identity in the business enterprise before and after a change . . ."

Id. at 551. See also *National Labor Relations Board v. Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (6th Cir. 1972) (". . . the hiring of a large portion of the predecessor's employees is persuasive in finding a successor status".) *National Labor Relations Board v. Interstate 65 Corporation*, 453 F.2d 269 (6th Cir. 1971) (court ". . . must look to all the circumstances accompanying the transfer to determine whether *the nature of the employing industry has undergone such a basic change* that the collective bargaining unit . . . is no longer appropriate"). The factors to be considered in reaching such a determination include:

> (1) whether there has been a substantial continuity of the same business operations;
>
> (2) whether the new employer uses the same plant;
>
> (3) whether he has the same or substantially the same work force;
>
> (4) whether the same jobs exist under the same working conditions;
>
> (5) whether he employs the same supervisors;
>
> (6) whether he uses the same machinery, equipment, and methods of production; and
>
> (7) whether he manufactures the same product or offers the same services. Morrris, *supra* at 368-69.

The evidence establishes that Sears was in fact a successor employer. When viewed from the employees' position, *General Teamsters, Chauffeurs and Helpers, Local Union No. 249 v. Bill's Trucking, Inc.*, 493 F.2d 956 (3rd Cir. 1974), there was substantial continuity of operations. The services rendered, the work force, and the equipment used remained substantially the same. While there were necessarily some changes, the Court concludes that these were insufficient to overcome the conclusion that Sears was a successor employer.

Nonetheless, this status does not mean that Sears was bound to the substantive provisions of the collective bargaining agreement entered into by DAS and Local 610. The duty imposed upon the successor employer is the duty to bargain or to arbitrate with the existing union. *National Labor Relations Board v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *John Wiley & Sons, Inc., supra.*

In *John Wiley & Sons, Inc., supra*, the Court noted that "a union might abandon its right to arbitration [with the successor] by failing to make its claims known . . .". Accordingly, the Court concludes that Sears can not be held at fault for failing to arbitrate with Local 610, absent a demand for the same by the union. The evidence established herein indicates that Local 610 did not request that Sears arbitrate under the DAS-Local 610 agreement. The Court must therefore conclude that the right to insist on arbitration has been abandoned. Plaintiffs, as members of the union, can not insist that this action be taken. See *Brown v. Sterling Aluminum Products Corporation*, 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967), holding that

> . . . whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce the right. Thus the individual would have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract . . . *Id.* at 657.

Were plaintiffs to urge that they have suffered damages as a result of Local 610's failure to request arbitration, thus "abandoning" them to Local 688, the Court would be compelled to conclude that § 301 jurisdiction would be lacking. In *Amalgamated Association of Street, Electric Railway & Motor Coach*

Employees of America v. Lockridge, 403 U.S. 274 (1971); the Court noted that jurisdiction existed under § 301 to determine alleged "union interference with rights conferred on individual employees by the employer's promises in the collective-bargaining agreement, where it is proved that such interference constituted a breach of the duty of fair representation." *Id.* at 298-99. The Court further noted that a breach of the duty of fair representation must be supported by proof of arbitrary or bad-faith conduct, evidence of fraud, deceitful action or dishonest conduct.

In *Gainey v. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, 313 F.2d 318 (3rd Cir. 1963), the court categorized unfair representation suits as follows:

> (1) racial discrimination . . .; (2) involving the arbitrary sacrifice of a group of employees' rights in favor of another stronger or more politically favored group, often in direct violation of established union practice . . . and (3) discriminatory measures taken against an individual which sacrificed his rights for hostile and improper reasons. *Id.* at 324.

Clearly, the facts presented in this suit fail to fall within one of these categories. Evidence of bad faith, deceit, dishonesty, fraud or arbitrary conduct is completely lacking herein. At best it could be said that Local 610 acted erroneously in concluding that there was nothing to arbitrate once DAS closed its business. See *Hines v. Anchor Motor Freight, Inc.*, 44 U.S.L.W. 4299 (March 3, 1976) holding that "mere errors in judgment" are insufficient to support a claim of breach of the duty of fair representation. Obviously Local 688 could not have breached its duty of fair representation, since it was not plaintiffs' bargaining representative when DAS ended its business.

In *Lockridge, supra*, the Court noted that

> The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective-bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of *Smith v. Evening News* [371 U.S. 195 (1962)] is applicable only to those disputes that are governed by the terms of the collective-bargaining agreement itself.

The Court's conclusion therein was that where the conduct involved was arguably protected by § 7, or prohibited by § 8, of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158, the doctrine of pre-emption precluded § 301 jurisdiction.

Section 7 provides that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Section 8(b) of the Act provides, in part, that

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 [section 7 above] of this title . . .
>
> . . .
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees . . .

Local 610's failure to request arbitration with Sears in accordance with *John Wiley & Sons, supra*, was arguably a refusal to

bargain collectively with an employer. Plaintiffs' claims that Local 610 abandoned them in favor of Local 688 are arguably an attempt to coerce. Accordingly, the Court lacks jurisdiction over such claims.

The Court has concluded that while jurisdiction may conceivably exist over plaintiffs' claims that DAS and Sears were co-employers, the evidence presented failed to establish the existence of a co-employer status. The Court has further concluded that jurisdiction is lacking to determine the allegations of conspiracy. Although not argued by plaintiffs, the Court has considered the question of Sears' status as a successor employer. While finding that the facts established that Sears was a successor employer, the Court has concluded that Local 610's failure to assert the right to arbitration waived that right. The Court has further concluded that plaintiffs, as union members, can not compel this arbitration, a request which plaintiffs have not made herein, and that jurisdiction is lacking to determine whether plaintiffs have suffered any damages as a result of Local 610's failure to request arbitration. Accordingly, judgment will be entered for defendants.

/s/ JOHN F. NANGLE
United States District Judge

Dated: June 25, 1976.

Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-455

ALFRED RUSSOM, ET AL.,

Petitioners,

vs.

SEARS, ROEBUCK AND CO., A CORPORATION, AND LOCAL 610, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOCAL 688, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

MEMORANDUM ON BEHALF OF SEARS, ROEBUCK AND CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KALVIN M. GROVE
BURTON L. REITER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7818
233 South Wacker Drive
Chicago, Illinois 60606
Attorneys for Respondent, Sears, Roebuck and Co.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Respondent Sears, Roebuck and Co. ("Sears") respectfully prays that this Court deny Petitioners' petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 29, 1977.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners predicate their petition on three premises: *first,* that the courts below "missed the substance" of the action and refused to fashion an equitable remedy; *second,* that the courts below ignored evidence which, Petitioners assert, amounts to a breach by Respondent Local 610, International Brotherhood of Teamsters ("the Union") of its duty of fair representation; and, *third,* that the courts below erred by not requiring Sears to arbitrate with the Union.

Sears submits that the first two points do not merit a reply: the first is entirely specious and finds no support in the record; the second was adequately and correctly disposed of below when the Court of Appeals, after considering *all* of the evidence and acting in accord with *Vaca* v. *Sipes,* 386 U. S. 171 (1967) determined that the Union did not breach its duty of fair representation because its "conduct . . . was not arbitrary, discriminatory or in bad faith." 558 F. 2d 439, 442; Pet. App., p. A17.

Petitioners' third contention, for the reasons discussed below, likewise has no merit.

1. *John Wiley & Sons, Inc.* v. *Livingston,* 376 U. S. 543, 548 (1964), did hold that "in appropriate circumstances . . . the successor employer may be required to arbitrate with the union under the [predecessor's] agreement." *Wiley* also recognized, however, that, as occurred in this case when the Union declined to request arbitration, "a union might abandon its right to arbitration [with the successor] by failing to make its claims known." 376 U. S. at 551. Such "abandonment" will not occur, of course, where there is a breach by a union of its duty of fair representation; however, "[a] breach of the statutory duty of fair representation occurs only where a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes,* 386 U. S. at 190.

In order to show arbitrary, discriminatory or bad faith conduct, "[t]here must be substantial evidence of fraud, deceitful action or dishonest conduct." *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 299 (1971). Here, there was no evidence of such conduct by the Union. See 558 F. 2d at 442; Pet. App., p. A17.

Only "[t]he union's breach of duty [of fair representation] relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures". *Hines* v. *Anchor Motor Freight, Inc.,* 424 U. S. 557, 567 (1976). The courts below, therefore, properly did not impose any duty to arbitrate on Sears. *Wiley,* does not, as the Petitioners assert, require any different result.

2. Moreover, while in *Wiley* this Court did indicate that in some instances there would be a duty to arbitrate on the part of a non-unionized successor employer, here Sears, the successor, has a union contract with another union covering the type of service work performed by the predecessor's employees. 558 F. 2d at 441; Pet. App., p. A14. Such "presence of another union at [Sears] . . . make[s] the enforcement of the [predecessor's arbitration clause] as against [Sears] unpractical and inequitable," even had arbitration been demanded. *McGuire* v. *Humble Oil & Refining Company,* 355 F. 2d 352, 353 (2d Cir. 1966). The requirement of arbitration would create "an obvious conflict between the interest of the [Sears] employees as a whole and the interests of the [Sears] employees who formerly worked for [the predecessor]" for "it is not unlikely that they would press for an award giving these employees preferential treatment in the matter of seniority, job security, working conditions and other benefits that would adversely effect the other [Sears] employees." *Id.* at 357. In addition, ordering Sears to arbitrate with the predecessor union could also result in the commission of an unfair labor practice by forcing Sears to bargain with a minority union when a majority union is in existence, since the "duty of the employer under

the [National Labor Relations] Act is to bargain collectively with the collective bargaining representative of a majority of the employees in the unit. 29 U. S. C. Section 158(a)(5)". *Id.* at 358.

For all of the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

KALVIN M. GROVE
BURTON L. REITER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7818
233 South Wacker Drive
Chicago, Illinois 60606
Attorneys for Respondent, Sears, Roebuck and Co.